Supreme Court of the United States

OCTOBER TERM, 1950

No. 399

JACK H. BREARD,
Appellant,

against

CITY OF ALEXANDRIA,
Appellee.

BRIEF IN BEHALF OF THE NATIONAL ASSOCIATION OF MAGAZINE PUBLISHERS, INC., AS *AMICUS CURIAE*

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CITATIONS

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The National Association of Magazine Publishers, Inc., appearing as *amicus curiae* in the above-entitled cause, submits this brief to the Court to urge, in the interest of its members who publish and distribute magazines with an aggregate circulation per issue of 140,000,000 copies, and in the interest of the public, that this Court reconsider its recent decision herein, as prayed for in the appellant's petition for a rehearing.

In the opinion rendered on June 4, 1951, by Mr. Justice Reed, the majority of this Court sustained the validity of the so-called "Green River" ordinance of Alexandria, Louisiana, as applied to the appellant, who is engaged in the business of soliciting subscriptions to magazines from house-to-house, rejecting the contentions of the appellant and several *amici curiae* that such ordinance was contrary to (1) the "due process" clause of the Fourteenth Amend-

ment, (2) the "interstate commerce" clause, and (3) the right of freedom of the press under the First Amendment.

The far-reaching effect of the Court's decision on the American periodical press and on house-to-house selling generally, seems to this Association to amply justify this respectful request for further consideration of the issues, which seem to us to have been misconstrued, in part, by the Court.

Start with the unquestioned proposition that the basically American institution—the magazine—is one of the great forces in bringing to the American public, both rural and urban, educational and informative material. It is the only printed medium which carries *throughout the nation*, the political, business and scientific ideas and thoughts of our leaders.* Nor can it be questioned that *"A well-informed public is America's greatest security"*.

In its opinion, the Court said that the Green River type ordinance "can be characterized as prohibitory * * * only in the limited sense of forbidding solicitation of subscriptions by house-to-house canvass", and suggested that "the usual methods of solicitation—radio, periodicals, mail, local agencies—are open." Of course, these methods are open (although local agencies are also subject to the prohibitions of these ordinances), but they already are and have been used to the greatest extent possible. Even when all other methods of solicitation are used to a maximum, it is still necessary to use house-to-house solicitation to procure approximately one-third of the total circulation of

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* The record shows (R. 14A) that, for the year 1948, the circulation per issue for all general magazines and farm publications reporting to ABC was in excess of 141 million copies; and of this amount, over 30%, or 43,400,000 copies, was attributable to field subscription solicitation.

American magazines. In other words, millions of citizens will cease to be reached by our magazine press if this Court's decision in the instant case stands unmodified.

While, therefore, the Court says that all regulatory legislation is prohibitory in a limited sense, an ordinance which eliminates an entire method of doing business can hardly be said to be regulation as that word is commonly used in connoting limitations upon time and manner of conducting a legitimate activity. In its practical operation and effect, the Green River type ordinance is "prohibition" in the true sense of the word. And such prohibition is not limited to subscriptions written annually by Keystone Reader's Service. This Court must also take into account the subscriptions heretofore written by Keystone's forty or more major competitors which will also be directly affected.

So far as may be determined from the majority opinion, this Court did not give full consideration to whether the purported purposes of the ordinance, to protect householders from annoyance and intrusion, could not more simply be attained by the traditional approach heretofore approved by this Court in the *Struthers* case, to wit, the placing by those householders, who individually desire to exclude solicitors, of a sign at the entrance of their premises reading "No Peddlers or Solicitors Allowed". To say, as the majority opinion does, that "a sign would have to be a small billboard", is not in accord with the fact and may fairly be characterized as an evasion of the basic principle that such a decision, under our theories of the rights of the individual, should clearly rest with the householder.

This case marks the first time this Court has upheld the right of a governmental body to prohibit a legitimate method of circulating lawful publications. By stating that "a city council may speak for the citizens on matters sub-

ject to the police power", the Court has, in effect, applied a "due process" test in sanctioning abridgment of the freedom of the press. It permits a city council, upon the mere showing of a "rational basis" therefor, to adopt legislation which bars the solicitation of magazine subscriptions at the home, notwithstanding that the record conclusively establishes that millions of the American readers regularly make use of this circulation method.

In so doing, the Court makes no mention of its prior decision in *Schneider* v. *State*, 308 U. S. 147, invalidating, *inter alia*, a municipal ordinance forbidding house-to-house solicitation and distribution of literature without a police permit, and also regards as inapplicable its decisions in *Marsh* v. *Alabama*, 326 U. S. 501, and *Tucker* v. *Texas*, 326 U. S. 517, holding that a private corporation and the United States Government could not prohibit the distribution of literature on property owned and administered by them, respectively. *A fortiori*, a city council should not be allowed to prohibit the distribution of literature on property owned by individuals who may welcome such distribution.

The Court refers to *Martin* v. *Struthers*, 319 U. S. 141, as being "the case which comes nearest to supporting appellant's contention", and then limits the application of this case to ordinances involving "the free distribution of dodgers advertising a religious meeting". But no such limitation is found in the language of the opinion of the Court in the *Struthers* case; nor has the *Struthers* case been so limited in any subsequent decision of this Court. See *Marsh* v. *Alabama* and *Tucker* v. *Texas*, *supra*; *Kovacs* v. *Cooper*, 336 U. S. 77, 86; *Terminiello* v. *Chicago*, 337 U. S. 1, 30; *Niemotko* v. *Maryland*, 340 U. S. 268, 278 (concurring opinion of Mr. Justice Frankfurter). Indeed, in the case of a householder desiring privacy, how can it be said that being called to the door to receive a religious announcement is any less disturbing than being asked to subscribe to a magazine?

If this "due process" or "rational basis" test is now to be the criterion of the validity of police power exercise in free speech and free press cases, there would seem to be no need for the specific safeguards of the First Amendment, as the Fifth and Fourteenth Amendments would suffice for all purposes of government. The First Amendment was, however, enacted in order that the rights guaranteed by it would be beyond reach of majorities, and this Court has consistently followed this principle. See *Marsh* v. *Alabama*, 326 U. S. 501, 505; *Board of Education* v. *Barnette*, 319 U. S. 624, 638-639; *Schneider* v. *State*, 308 U. S. 147, 161.

This is not to say that the press is entirely beyond regulation. The public is entitled to protection and may properly be protected by the government, despite the First Amendment guarantees, where there is a "danger of a serious substantive evil that rises far above public inconvenience, annoyance or unrest", *Terminiello* v. *Chicago*, 337 U. S. 1, 4; *Giboney* v. *Empire Storage Co.*, 336 U. S. 490, 502; *Bridges* v. *California*, 314 U. S. 252, 262; *Schneider* v. *State*, 308 U. S. 147, 162. But this danger must be substantial and serious, according to Mr. Justice Brandeis in *Whitney* v. *California*, 274 U. S. 357, 374-376, and legislative preferences and beliefs cannot transform minor matters of public inconvenience and annoyance into substantive evils of sufficient weight to warrant the curtailment of liberty of expression, *Dennis* v. *United States*, —— U. S. —— (decided 6/4/51); *Bridges* v. *California*, 314 U. S. 252, 263; *Schneider* v. *State*, 308 U. S. 147, 161.

In the *Dennis* case, *supra*, decided the same day as the present case, this Court faced squarely the application of the above test; and in so doing, referred to a number of prior cases where ordinances had been held invalid on the ground "that the interest which the state or municipality was attempting to protect was itself too insubstantial to warrant restriction of speech". Among the cases cited as involving the protection of an insubstantial interest,

were *Schneider* v. *State*, 308 U. S. 147; *Cantwell* v. *Connecticut*, 310 U. S. 296; and *Martin* v. *Struthers*, 319 U. S. 141, all involving house-to-house solicitation. It appears to us incongruous that the annoyance caused by such an activity can, in one instance, be too insubstantial to afford a reasonable basis for local legislation and, in the next, be of sufficient importance to justify an ordinance prohibiting the identical activity.

The only possible ground upon which these cases can be reconciled is that, in those situations where the ordinances were declared invalid, the press or speech in question involved an element of religious activity, whereas in the present case the transactions involved have "a commercial feature". From this, it might be inferred that the guarantee of freedom of the press does not exist where the printed material is sold for a price or where a profit motive is involved. In light of past decisions, this certainly could not have been the intention of this Court. (See *Grosjean* v. *American Press Co.*, 297 U. S. 233; *Winters* v. *New York*, 333 U. S. 507.) Nor can it be held that religion is in a position different or superior to the remaining rights guaranteed by the First Amendment—all are co-equal. (See *Saia* v. *New York*, 334 U. S. 558; *Thomas* v. *Collins*, 323 U. S. 516; *Prince* v. *Massachusetts*, 321 U. S. 158.)

It is respectfully requested, therefore, in order that the situation may be clarified, that this Court grant appellant's petition for a rehearing herein and clarify once for all whether the mere fact of sale gives written matter less protection under the First Amendment, and whether the guarantee of freedom of religion is a guarantee superior to the guarantees given by the First Amendment to the freedoms of speech and the press.

On a rehearing of this case, the Court should not only clarify the rights of a free press, but should also reconsider

the full impact of the Green River type ordinance upon the unquestioned right of the individual householder to determine who may and who may not enter upon his premises. In the majority opinion, the Court states that "to the city council falls the duty of protecting its citizens against the practices deemed subversive of privacy and of quiet", and emphasis is placed upon the fact, stipulated by the parties, that *some* householders complained against any uninvited intrusion into their homes (R. 6).

The Court, on the other hand, gives little weight to the commonly known fact that local ordinances of the Green River type usually are the result of pressure from local merchants, on the ground that this fact is unsupported in the record. The stipulation of facts, however, carefully provided (R. 6) that the complaint of some householders was only "among other reasons" for the enactment of the Alexandria ordinance; and the Court recognizes that "the local merchant, too, has not been unmindful of the effective competition furnished by house-to-house selling in many lines."

However, even if it be assumed that the ordinance was passed only because *some* householders were annoyed and inconvenienced, what of the other householders who may or may not constitute a majority of the local citizenry, and who prefer to buy their magazines and other articles of commerce through door-to-door solicitors and salesmen? Many is the housewife who is confined to her home because of sickness, care of children or crowded conditions in the local stores. Is her right to have people come to her door to be curtailed because her neighbor desires privacy in her home? The suggestion that the former may invite the solicitor or salesman to her home is most unrealistic, for where will she find him, how will she know when he is about, or where he is.

No other decision of this Court has been found where a legislative body has been permitted to dictate what activi-

ties may transpire on one person's property when such activities did not harm or in any way affect the lives of others (Cf. *Tucker* v. *Texas*, 326 U. S. 517, 520). This has been the true heritage of the citizens of the United States. To be free from the dictates of others was the reason for the travels and hardships of the Puritans, and many other immigrant groups; it was the reason for the fighting of our wars; and, most important, it was the reason for the enactment of the First Amendment and also the Fourth Amendment to our Federal Constitution.

An individual must in a civilized and orderly society be subject to some regulation, but such regulation can only be valid where the health, safety or general welfare of others is concerned. How can it be asserted that a peddler or solicitor calling at one door in any way affects the life of the person next door? Yet this Court, in upholding the Alexandria ordinance, relies exclusively upon cases involving the protection of the community under the so-called police power, where city councils are authorized to act because the actions of some have a direct effect upon the lives and well-being of others. In *Kovacs* v. *Cooper*, 336 U. S. 77, chiefly relied on by the Court, the issue involved the free use of a loudspeaker, noises from which carried throughout the entire community to those who did not want to listen, as well as those who did. How different is the present case involving the call of a solicitor upon an individual householder, who can put up a simple sign forbidding solicitors if he does not want them to ring his bell.

Why should not the right to make a determination as to who will be allowed on one's own property be left to the owner of such property, which is where it belongs? After all, group control of the individual is not indigenous to this country, as it was to the Germany of Hitler, and was and is to the Russia of Stalin. Allowing the individual householder to decide who shall open his gate, come up his walk, and ring his door-bell, is in accord with the American

tradition and is the only proper way to preserve the rights of all concerned.

In conclusion, The National Association of Magazine Publishers, Inc., as *amicus curiae,* respectfully requests that the appellant's petition for rehearing be granted and that, upon further consideration, the judgment appealed from be reversed.

Respectfully submitted,

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